No. 20756

In the

United States Court of Appeals

FOR THE NINTH CIRCUIT

BRIDGE CORPORATION OF AMERICA,

Appellant,

vs.

THE AMERICAN CONTRACT BRIDGE LEAGUE, INC., *et al.*,

Appellees.

BRIEF FOR APPELLEES.

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Jurisdictional Statement.

This is an appeal from a judgment of the United States District Court for the Southern District of California, Central Division, entered on January 3, 1966 dismissing all three causes of action of plaintiff's Second Amended Complaint. The First Cause of Action was dismissed for lack of jurisdiction over the subject matter; the Second and Third Causes of Action for failure to state a claim upon which relief can be granted [Judgment, C.T. 175, App. C.]*

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*References in this brief to pleadings and other documents included in the Clerk's Transcript will identify the particular document and cite the transcript page, e.g. "Complaint, C.T. ...." The Reporter's Transcript of the hearing on the motion to dismiss plaintiff's Second Amended Complaint will be cited "R.T. ...." For convenience, certain portions of the Clerk's Transcript have been set out as appendices to this brief. These include: Appendix A — Memorandum Opinion filed 12/21/64; Appendix B — Memorandum Opinion filed 12/16/65; Appendix C — Judgment entered 1/3/66. References to Appellant's Opening Brief are cited as "Brief, p. ....."

The Second Amended Complaint was filed on March 5, 1965, and contained three alleged causes of action. The First Cause of Action was against the American Contract Bridge League, Inc. (hereinafter referred to as the "League"), and certain officers of the League; jurisdiction was allegedly based upon Sections 1, 2 and 15 of Title 15 of the United States Code (Sections 1 and 2 of the Sherman Act, and Section 4 of the Clayton Act). The Second and Third Causes of Action were against only the League and one of its officers, with jurisdiction purportedly based upon diversity of citizenship (28 U.S.C. § 1332.)

On October 29, 1965 defendants filed a Notice of Motion and Motion to Dismiss all three causes of action of plaintiff's Second Amended Complaint, and accompanied the motion with a memorandum of points and authorities. Plaintiff filed a memorandum of points and authorities in opposition to the motion to dismiss and the matter came on for hearing on November 29, 1965 before the Honorable Jesse W. Curtis. By Memorandum Opinion dated December 16, 1965 the Court granted the motion to dismiss the First and Second Causes of Action on the grounds that "the conduct complained of does not constitute the kind of 'trade or commerce' contemplated by the Sherman Act" or "by the Cartwright Act," and as to the Third Cause of Action on the ground that the alleged "restriction as to the recording of master points is reasonable and logical under the circumstances, and is permissible." [Opinion, C.T. 173-74, App. B.]

Jurisdiction of this Court is based upon 28 U.S.C. § 1291.

Counter-Statement of the Case.

Plaintiff is a California corporation which developed a digital computer designed to compute and record the match points scored by bridge players at duplicate bridge tournaments. [Complaint, C.T. 133.][1]

The League is a non-profit corporation organized under the membership corporation laws of the State of New York for the purpose of promoting the playing of bridge throughout the United States and Canada. [Opinion, C.T. 128, App. A; Complaint, C.T. 135.] It is the corporate combination of several hundred membership associations called "units" which conduct bridge tournaments in particular areas designated by the League. [Opinion, C.T. 128, App. A; Complaint, C.T. 134.] The League operates a merit-ranking system for bridge players; as an integral part of this system it awards bridge players so-called "master points" based upon playing performance at bridge tournaments. [Complaint, C.T. 135; Opinion, C.T. 129, App. A.] The League also conducts and sponsors certain duplicate bridge tournaments, and computes and records the scores of players at these bridge tournaments. [Complaint, C.T. 137.]

During August of 1963 plaintiff obtained the approval of certain tournament officials to use plaintiff's computer to score a bridge tournament to be conducted by the Riverside and Redlands units of the League. No contract was entered into, but plaintiff had a reasonable probability that its computer would be so used. [Complaint, C.T. 148-49.] However, Alvin Landy, the League's executive secretary, notified the directors and

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[1]Unless otherwise indicated, references to "Complaint" refer to the Second Amended Complaint.

managers of the tournament that if the units used the computer to score the bridge tournament, the League would not award any of its master points to the players participating in the tournament. As a result, the tournament managers and directors declined to use the computer to score the bridge tournament. [Complaint, C.T. 149.] Because these acts of the League became known to other tournament officials, plaintiff was unable to use its computer to score other tournaments. [Complaint, C.T. 150.] Plaintiff thus claims it has lost the value of the investment in the computer, plus the profits that would have been expected from scoring these bridge tournaments. [Complaint, C.T. 150.]

Prior Proceedings.

The original complaint in this action was filed on or about July 7, 1964. Defendants moved to dismiss this complaint for lack of subject matter jurisdiction over the causes of action based upon the Sherman Act, and for failure to state a claim upon which relief could be granted for the remaining causes of action. However, prior to the hearing on the motion to dismiss, plaintiff filed a First Amended Complaint. [C.T. 4.]

Defendants again moved to dismiss all causes of action of the First Amended Complaint on the grounds that the court lacked subject matter jurisdiction to consider the causes of action based upon the Sherman Act, and that the remaining causes of action based upon diversity failed to state a claim upon which relief could be granted. [Motion, C.T. 47-49.] Defendants filed a

memorandum of points and authorities in support of the motion to dismiss, and in further support of the motion to dismiss for lack of subject matter jurisdiction submitted various exhibits setting out various aspects of the League's activities. [Exs., C.T. 85-101.] Plaintiff then filed a memorandum in opposition to this motion to dismiss, and accompanied this memorandum with affidavits and exhibits. [Exs., C.T. 118-127.] (See Appellant's Opening Brief for numerous references to these exhibits.) The motion to dismiss came on for hearing before the Honorable Jesse W. Carter, and by Memorandum Opinion dated December 21, 1964 the Court dismissed the causes of action based upon the Sherman Act on the ground that even if some monopolistic effects or a restraint of trade may result from the activities alleged, the scoring of bridge tournaments is "not the kind of 'trade or commerce' that Congress had in mind in enacting the Sherman Act." The remaining counts were dismissed for failure to properly allege diversity of citizenship. [Opinion, C.T. 128, 130; App. A.] Plaintiff was granted leave to file an amended complaint.

A Second Amended Complaint was thereafter filed, but the complained of activities were the same as alleged in the First Amended Complaint. [See analysis at C.T. 161-165; Opinion, C.T. 173-174, App. B.] As pointed out above, the judgment of dismissal of this Second Amended Complaint forms the basis for this appeal.

Statutes Involved.

Plaintiff attempts to establish jurisdiction for the First Cause of Action of the Second Amended Complaint under Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2 and under Section 4 of the Clayton Act, 15 U.S.C. § 15.

Section 1 of the Sherman Act provides that:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal; * * *."

Section 2 of the Sherman Act provides that:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conpsire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, * * *."

Section 4 of the Clayton Act provides that:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . . shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Plaintiff's Second Cause of Action of the Second Amended Complaint is based upon diversity of citizenship jurisdiction, and attempts to state a claim under the California Cartwright Act, Sections 16,700 through 16,758 of the California Business & Professions Code. Section 16,720 is the basic section of the Cartwright Act; this section is set out in full as Appendix D to this brief.

Questions Presented.

1. Whether the calculating and recording of points scored by bridge players at duplicate bridge tournaments is the type of trade or commerce encompassed within the meaning of the Sherman Act.

2. Whether such calculating and recording of bridge scores is the type of trade or commerce encompassed within the meaning of the California Cartwright Act.

3. Whether the activities of the League in limiting the type of scoring devices utilized by its units to score bridge tournaments where the League is to award its master points, are so unreasonable and unprivileged that they constitute an unlawful interference with prospective business relationships.

Summary of Argument.

In determining whether there is the requisite trade or commerce to support jurisdiction under the Sherman Act it is well established that only the activities complained of as violating that Act can be considered. The lower court correctly applied this principle and limited the scope of inquiry to whether the calculating and recording of the points scored by bridge players at bridge tournaments is the type of trade or commerce contemplated by Congress in enacting the Sherman Act.

The United States Supreme Court in the leading case of *Apex Hosiery Co. v. Leader* (1943), 310 U.S. 469, 84 L. Ed. 1311, restricted the application of the Sherman Act to unreasonable restraints on commercial competition. In a later decision the Supreme Court reaffirmed the validity of *Apex*, and stated that the Act is aimed primarily at combinations having commercial ob-

jectives and is applied only to a very limited extent to the activities of organizations which have other objectives.

These cases, plus other federal cases, clearly support the lower court's conclusion that the calculating and recording of bridge scores is not the type of commercial activity encompassed within the Sherman Act. An examination of the mechanics of such scoring shows clearly that this is the simplest sort of non-commercial activity, very much like the scoring of track meets, tennis matches, chess tournaments or other games. The Sherman Act has not been, and should not be extended to apply to this type of non-commercial activities. Thus, the lower court properly held there was no trade or commerce to support Sherman Act jurisdiction over plaintiff's First Cause of Action, and properly dismissed this cause of action.

The calculating and recording of bridge scores is not trade or commerce within the meaning of the California antitrust laws for the same reason it is not trade or commerce within the meaning of the Sherman Act. California cases clearly recognize exceptions to the Sherman Act created by federal decisions, and have applied these same exceptions to cases brought under the Cartwright Act. Furthermore, the very terms of the California Act show the Act is restricted to normal commercial activities. Therefore, although the lower court may have diversity jurisdiction over plaintiff's Second Cause of Action, it properly held that this cause of action did not state a claim upon which relief can be granted.

Because of the reasonableness of the League's actions in limiting the type of scoring devices used by its units in tournaments where master points are to be awarded, the actions do not amount to an unlawful interference with business relationships. Furthermore, California law clearly recognizes that the activities complained of by plaintiff are protected by a privilege. The activities were necessary and reasonable because of the confidential relationship between the League and its units, and because the League was merely controlling its master point system by restricting the type of scoring devices to be utilized at tournaments where master points are to be awarded. Since the basis of the privilege is revealed by the allegations of the complaint, the District Court properly dismissed the Third Cause of Action for failure to state a claim on which relief can be granted.

ARGUMENT.

I.

In Determining Whether There Is the Requisite Trade or Commerce to Support Jurisdiction Under the Sherman Act, Only the Acts Complained of as Violative of the Act Are to Be Considered.

The lower court in concluding that the scoring of games of duplicate bridge at bridge tournaments was not the type of trade or commerce encompassed by the Sherman Act, correctly applied the principle that only the activities complained of by a treble damage plaintiff are relevant in determining the jurisdictional basis necessary to support the action. This principle has been well established in this Circuit and in other Circuits; its application is necessary to limit the scope of inquiry in determining whether the court has jurisdiction over the subject matter of an action brought under the Sherman Act.

This rule has been set out in a number of cases considering the question of whether the complained-of activities were in interstate or foreign commerce; naturally the same rules would be applicable in determining the even more basic question of whether the complained-of activities are "trade or commerce" within the meaning of the Sherman Act.

A recent Ninth Circuit case sets out these requirements. In *Page v. Work* (9th Cir. 1961), 290 F. 2d 323, cert. denied 368 U.S. 875, the Court affirmed the dismissal of a private antitrust action since the necessary effect on interstate commerce was missing. In *Page v. Work* both the plaintiff and defendant were engaged in interstate commerce, *but this fact was considered im-*

material since the complained-of activities had no effect on interstate commerce.

> "* * * The test of jurisdiction is not that the acts complained of affect a business engaged in interstate commerce, but that the *conduct complained of affects the interstate commerce of such business.*" (290 F. 2d at 330.) (Emphasis added.)

Another recent case also sets out the rules for determining whether a Court has jurisdiction to consider an antitrust action. In *Lieberthal v. North Country Lanes, Inc.* (2d Cir. 1964), 332 F. 2d 269, the Court in dismissing a private treble damage action set out the requisite restraint on interstate commerce necessary for a violation of Sections 1 or 2 of the Sherman Act.

> "To establish a violation of either Section 1 or Section 2 of the Sherman Antitrust Act Lieberthal was required to allege facts showing that the conpiracy had an impact on *interstate* commerce either because the acts complained of occurred in interstate commerce of because those acts, though occurring wholly on the local level, substantially affected interstate commerce. * * *" (332 F. 2d at 270.)

The Court clearly pointed out that it is not enough to show that the defendant is engaged in interstate commerce in some aspects of its business—it must be shown that the *complained-of activities* affect interstate commerce.

> "It may be that defendants, as owners of national bowling alley chains, are interstate businesses. But 'the test of jurisdiction is not that the acts complained of affect a business engaged in interstate commerce, but that the conduct complained

> of affects the interstate commerce of such business.' *Page v. Work*, supra at 330 of 290 F. 2d. Accord, *United States v. Yellow Cab Co.*, supra (carriage by defendant of passengers from one train station to another as in interstate commerce but other taxi transportation to and from stations is intrastate commerce). Lieberthal does not allege any restraint of the national activities in which defendants are engaged; he complains only of an agreement affecting their intrastate operations." (332 F. 2d at 272.)

Other cases holding that the plaintiff failed to demonstrate that the complained-of acts had the necessary effect on interstate commerce in order to bring an action under the antitrust laws are:

> *Best Advertising Corp. v. Illinois Bell Tel. Co.* (7th Cir. 1965), 339 F. 2d 1009;
>
> *Gordon v. Illinois Bell Tel. Co.* (7th Cir. 1964), 330 F. 2d 103, 106-07;
>
> *Elizabeth Hospital, Inc. v. Richardson* (8th Cir. 1959), 269 F. 2d 167, 170-71, cert. denied 361 U.S. 884;
>
> *Riggall v. Washington County Medical Society* (8th Cir. 1957), 249 F. 2d 266, cert. denied 355 U.S. 954;
>
> *Spears Free Clinic v. Cleere* (10th Cir. 1952), 197 F. 2d 125.

It should be noted that the *Page v. Work* and *Lieberthal* cases are, and were, cited by defendants only in support of the rule that only the complained-of activities can be considered in determining subject matter jurisdiction; and that, therefore, the numerous allegations

concerning activities of the League that are in no way connected with the acts that gave rise to plaintiff's damage must be disregarded. Defendants, contrary to plaintiff's understanding (Brief pp. 15-16), make no claim that these cases are or are not factually similar to the present case. But defendants do claim these cases clearly establish the rule that only the complained of activities are relevant in determining Sherman Act jurisdiction.

In the present case the complained-of activities are simply those set out above—the League told its units that if plaintiff's computer were to be used to score a bridge tournament conducted by the units, then the League would not award its master points to the players competing in the tournament. Thus, the basic question for subject matter jurisdiction is whether the calculating and recording the scores of duplicate bridge players is the type of trade or commerce contemplated by Congress in enacting the Sherman Act.

II.

The Calculating and Recording of the Scores of Players at Duplicate Bridge Tournaments Is Not the Type of Commercial Activity Encompassed by the Sherman Act.

A. The Supreme Court Has Restricted the Application of the Sherman Act to Unreasonable Restraints on Commercial Activities.

Sections 1 and 2 of the Sherman Act proscribe certain unreasonable restraints on, or monopolization of, "trade or commerce among the several states, or with foreign nations." The United States Supreme Court has specifically refused to apply the Sherman Act to all restraints of any kind on interstate trade or commerce; it has instead restricted the Act to certain types of un-

reasonable restraints on "commercial competition." The basic rule of restrictive application of the Sherman Act was set out in the leading case of *Apex Hosiery Co. v. Leader* (1943), 310 U.S. 469, 84 L. Ed. 1311, as follows:

> "It was another and quite a different evil at which the Sherman Act was aimed. It was enacted in the era of 'trusts' and of 'combinations' of businesses and of capital organized and directed to control of the market by suppression of competition in the marketing of goods and services, the monopolistic tendency of which had become a matter of public concern. The end sought was the prevention of restraints to free competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services, all of which had come to be regarded as a special form of public injury.
>
> "For that reason the phrase 'restraint of trade' which, as will presently appear, had a well-understood meaning at common law, was made the means of defining the activities prohibited. The addition of the words 'or commerce among the several states' was not an additional kind of restraint to be prohibited by the Sherman Act but was the means used to relate the prohibited restraint of trade to interstate commerce for constitutional purposes, Atlantic Cleaners & Dyers v. United States, 286 US 427, 434, 76 L ed 1204, 1208, 52 S. Ct 607, so that Congress, through its commerce power, might suppress and penalize restraints on the competitive system which involved or affected inter-

> state commerce. Because many forms of restraint upon commercial competition extended across state lines so as to make regulation by state action difficult or impossible, Congress enacted the Sherman Act, 21 Cong. Rec. 2456. *It was in this sense of preventing restraints on commercial competition that Congress exercised 'all the power it possessed.'* Atlantic Cleaners & Dyers v. United States, supra (286 US 435, 76 L ed 1208, 52 S. Ct 607)." (310 U.S. at 492-495, 84 L. Ed. at 1323-1324; emphasis added.)

Although later Supreme Court decisions further developed the labor union "immunity" from Sherman Act prosecutions in terms of the statutory exceptions,[2] the limiting doctrine of *Apex* has been restated and applied in later cases. For example, the Supreme Court in the leading case of *Klor's v. Broadway-Hale Stores, Inc.* (1959), 359 U.S. 207, 3 L. Ed. 2d 741, reaffirmed the validity of *Apex* and its recognition that the activities of certain non-commercial organizations are outside the scope of the Sherman Act. The Court stated:

> "The court below relied heavily on Apex Hosiery Co. v. Leader, 310 US 469, 84 L ed 1311, 60 S Ct 982, 128 ALR 1044, in reaching its conclusion. While some language in that case can be read as supporting the position that no restraint on trade is prohibited by §1 of the Sherman Act unless it has or is intended to have an effect on market prices, such statements must be considered in the

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[2]The leading case is *United States v. Hutcheson* (1941), 312 U.S. 219, where the Court interlaced Sections 6 and 20 of the Clayton Act, and the Norris-LaGuardia Act, to immunize peaceful union picketing and boycotts from Sherman Act prosecution.

light of the fact that the defendant in that case was a labor union. *The Court in Apex recognized that the Act is aimed primarily at combinations having commercial objectives and is applied only to a very limited extent to organizations, like labor unions, which normally have other objectives.*" (Emphasis added; 359 U.S. at 213, n. 7, 3 L. Ed. 2d at 745, n. 7.)

Other Supreme Court and lower federal court cases have similarly restricted the application of the Sherman Act even though the activities involved were anti-competitive.

See:

United Mine Workers v. Pennington (1965), 381 U.S. 657, 670, 14 L. Ed. 2d 626, 636 (concerted efforts to influence public officials do not violate the Sherman Act even though intended to eliminate competition);

Eastern R.R. Conference v. Noerr Motor Freight (1961), 365 U.S. 127, 5 L. Ed. 2d 464 (same holding as in *Pennington*);

United States v. Boston & Maine R.R. (1965), 380 U.S. 157, 162, 13 L. Ed. 2d 728, 732 (bribery not within scope of antitrust laws);

Kennedy v. Long Island Rail Road Company (2nd Cir. 1963), 319 F. 2d 366, 372-373 (strike insurance plan of a group of railroads not within the scope of the Sherman Act);

Sterling Nelson & Sons, Inc. v. Rangen, Inc. (D. Ida. 1964), 235 F. Supp. 393, 399-400, aff'd (9th Cir. 1965), 351 F. 2d 851 (commercial bribery not under the scope of the Sherman Act).

It is therefore clear that there is a judicially created exception to the Sherman Act for certain non-commercial activities. The lower court in this case clearly recognized this exception, and properly applied it to the activities complained of by the plaintiff.

B. The Calculating and Recording of the Points Scored by the Players at Duplicate Bridge Tournaments Is Not the Type of Commercial Activity That Is Encompassed by the Sherman Act.

The two opinions of the District Court, and the judgment dismissing the Second Amended Complaint, rest on one simple premise. This premise is not, as alleged by plaintiff (Brief p. 13), that "services" as such are or are not exempt from the Sherman Act. The premise is not, as alleged by plaintiff (Brief p. 13), that activities such as the "business of producing, booking and presenting legitimate attractions on a multi-state basis"[3] are or are not interstate trade or commerce within the meaning of the Sherman Act. The premise is not, as alleged by plaintiff (Brief pp. 15-17), that the alleged restraints were only local in nature and hence there was no interstate trade or commerce. The premise is not, as alleged by plaintiff (Brief pp. 17-19), that the League is or is not a trade association. The premise is not, as alleged by plaintiff (Brief pp. 22-23), that any boycott would be justified by any alleged competence or lack of it of plaintiff. The premise is simply that the calculating and recording of the scores of bridge players at duplicate bridge tournaments is not the type of trade or commerce encompassed by the Sherman Act.

Plaintiff has failed to point to any authorities to demonstrate that the prohibitions of the Sherman Act apply

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[3] *United States v. Shubert* (1955), 348 U.S. 222, 226, 99 L.Ed. 279, 284.

to the scoring of bridge games played at tournaments. The primary reliance of plaintiff on the case of *Breier v. Northern California Bowling Proprietors Assn.* (9th Cir. 1965), 316 F. 2d 787 (Brief p. 21), is completely misplaced. First, the case involved a boycott directed at certain bowling alleys. Certainly the commercial aspects of the operation of bowling alleys are far different from that of simply the calculating and recording of bridge scores. Second, and even more important, the court in that case specifically refused to rule whether or not the complained-of activities amounted to interstate commerce sufficient to sustain Sherman Act jurisdiction. The court stated explicitly:

> "We do not decide whether the allegations of the present complaints charged a violation of the Sherman Act. The problems which would be presented on the present allegations may not arise on amended complaints. * * *
>
> "We also decline to speculate as to whether the amended complaints will be legally sufficient. It has been said that the sufficiency of an amended pleading ordinarily will not be considered on motion for leave to amend (cite omitted); and in any event it is inappropriate for an appellate court to evaluate possible amendments not yet considered by the court below." (316 F. 2d at p. 790.)[4]

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[4]The case involved solely the right of plaintiff to amend a complaint:

> "We think appellants were entitled to file amended complaints as a matter of right. 'A party may amend his pleading once as a matter of course at any time before a responsive pleading is served * * *.' Rule 15(a), Fed. R.Civ.P. A motion to dismiss is not a 'responsive pleading' within the meaning of the Rule. Neither the filing nor granting of such a motion before answer terminates the right to amend; an order of

That the scoring of bridge tournaments is not trade or commerce in the commercial sense is easily demonstrated by a simple reference to the "Laws of Duplicate Contract Bridge" as set out on pages 24 through 26 of plaintiff's brief. Certainly the activities described by these rules are a far cry from the type of commercial competition referred to in the *Apex* case as necessary to support Sherman Act jurisdiction. In fact, plaintiff concedes that the scoring of national bridge tournaments is not unlawful under the Sherman Act. (Brief p. 8.) Certainly the scoring of track meets, tennis matches, swimming meets, chess tournaments, or similar games and sports, could not reasonably be contended to be the type of trade or commerce contemplated by Congress in enacting the Sherman Act. And yet, this is exactly the type of activity involved in the present case.

Thus, the lower court correctly applied the governing principles enunciated by the Supreme Court to the facts at hand, and quite properly concluded that the calculating and recording the scores of bridge players at duplicate bridge tournaments is not "trade or commerce" within the meaning of the Sherman Act. [Opinions, C.T. 128, 173, Apps. A, B.] Without the requisite trade or commerce the lower court lacked subject matter jurisdiction over the First Cause of Action of plaintiff's Second Amended Complaint; therefore, the dismissal of this cause of action was entirely proper and should be affirmed by this Court.

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dismissal denying leave to amend at that stage is improper, and a motion for leave to amend (though unnecessary) must be granted if filed." (316 F.2d at p. 789.)

This latter point is not involved in the present case for plaintiff has not specified failure to grant leave to amend as an error [Statement, C.T. 182], and, of course, it could not do so because at the hearing on the motion to dismiss, the plaintiff's attorney stated that he had alleged the best case that the plaintiff had. [R.T. 49-50.]

III.

The Scoring of Duplicate Bridge Tournaments Is Not Trade or Commerce Within the Meaning of the California Antitrust Act for the Same Reasons It Is Not Trade or Commerce Within the Meaning of the Sherman Act.

Plaintiff's Second Cause of Action purports to be based upon diversity of citizenship jurisdiction and is directed only against the League and Alvin Landy, the Executive Secretary of the League. By incorporation by reference plaintiff makes the same allegations in the Second Cause of Action as in the First Cause of Action, except that the activities have allegedly violated certain provisions of the California antitrust law (commonly known as the Cartwright Act) rather than the Sherman Act. The allegations contained in the Second Cause of Action fail to state a claim against defendants upon which relief can be granted for precisely the same reasons that the Court lacks jurisdiction over the First Cause of Action. That is, the activities described are not "trade or commerce" within the meaning of the Cartwright Act, nor of the Sherman Act.

Initially, it should be noted that Federal decisions under the Sherman Act are authoritative in cases under the Cartwright Act.

> *Shasta Douglas Oil Co. v. Worth* (1963), 212 Cal. App. 2d 618, 624-625, 28 Cal. Rptr. 190;
>
> *Associated Plumbing Contractors v. Spencer & Son, Inc.* (1963), 213 Cal. App. 2d 1, 28 Cal. Rptr. 425.

Thus, the judicially created exception to the Sherman Act for non-commercial activities would undoubtedly be recognized by California courts.

See:

Osteopathic Physicians & Surgeons v. Calif. Medical Assoc. (1964), 224 Cal. App. 2d 378, 396, 398; Cal. Rptr. 641 (Cartwright Act does not apply to restraints on practice of medicine, nor to agreements to sponsor legislation.)

It should further be noted that the California Cartwright Act (Sections 16700 through 16758 of the California Business and Professions Code) by its own terms applies only to commercial ventures, not to non-commercial activities such as the scoring of bridge tournaments. In this regard, see especially Section 16720 (App. D) and its references to "trade or commerce", "the price of merchandise or of any commodity", "manufacturing, making, transportation, sale or purchase of merchandise, produce or any commodity", and so forth. Under both the Sherman and Cartwright Acts the complained-of activities must be "trade or commerce."

Thus, if the activities of the League in connection with the calculating and recording of the scores of players at bridge tournaments are not trade or commerce within the meaning of the Sherman Act, they are certainly not trade or commerce within the purview of the California antitrust laws. The exclusion from the purview of the Sherman Act is not based upon the lack of *interstate* trade or commerce—it is based upon the more fundamental point that there is lacking even the type of trade or commerce itself that is contemplated by the Sherman Act. Thus, the intrastate nature of defendants' activities does not in any way make these activities subject to the Cartwright Act since there is still lacking the necessary trade or commerce to state a claim under this Act.

So, although the District Court may have subject matter jurisdiction over the Second Cause of Action based upon diversity of citizenship, the Second Cause of Action still fails to state a claim upon which relief can be granted under the Cartwright Act because the Cartwright Act does not apply when there is no trade or commerce within the meaning of that Act. The dismissal by the lower court of the Second Cause of Action was correct and proper in all respects, and should be affirmed.

IV.

The Alleged Activities of the League Are Not an Unlawful Interference With Prospective Business Relationships Because It Is Reasonable and Privileged for the League to Control the Scoring Devices Utilized by Its Units in Tournaments Where the League Is to Award Master Points.

Plaintiff's Third Cause of Action of the Second Amended Complaint is against only the League and Alvin Landy, and is based upon diversity of citizenship jurisdiction. Plaintiff in this cause of action alleges the same facts as in the other causes of action—*i.e.*, that the League and Landy advised the Riverside and Redlands units of the League that if plaintiff's scoring device was utilized in bridge tournaments conducted by these units, then the match points normally awarded by the League would not be recorded nor scored. [Complaint, C.T. 148-150.] Since plaintiff did not have an existing contract with these units, it simply alleges that this conduct of the League amounted to unlawful interference with the prospective business relationship of the plaintiff. [Complaint, C.T. 149.]

This conduct is, of course, precisely the same conduct that the lower court held did not violate the Sherman Act because the requisite "trade or commerce" was missing. However, the Court in both opinions also held that the restrictions on the awarding the League's master points were a reasonable and logical method of carrying out the basic purposes of the League. The Court stated:

> "Any league or association must have rules and regulations in order to survive, and since its membership is entirely voluntary, it can impose almost any condition upon its membership which it wishes so long as these conditions are not unlawful and have some reasonable relation to the purpose of the league. *Molinas v. National Basketball Ass'n.*, 190 F. Supp. 241 (S.D.N.Y. 1961). Since the very basis of the League's appeal to its membership is the Master Point plan, it seems only reasonable and logical that the League should seek to control the mechanics of scoring. And since it is the one which awards the Master Points, it can give or withhold these Master Points upon whatever conditions it may determine." [C.T. 130, App. A.][5]

The Court adhered to this holding in the second Opinion. [Opinion, C.T. 174, App. B.] Accordingly, there was no *unlawful* intereference with prospective business relationships, and the Third Cause of Action was dismissed for failure to state a claim upon which relief could be granted. [Judgment, C.T. 175, App. C.]

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[5]In a recent case this Court held that similar rules of the Professional Golfers Association were reasonable and logical, and therefore exclusion of the plaintiff from participating in PGA tournaments on the basis of failure to comply with these rules was not unlawful. *Deesen v. The Professional Golfer's Assn.* (9th Cir. 1966), 1966 Trade Cases ¶ 71,706.

This ruling of the lower court is entirely logical, and comports fully with California authorities regarding the tort of interference with prospective business relationships. Logically, if the conduct of the League is reasonable and proper to protect legitimate interests of the League, it would be anomalous to hold that such conduct is in fact tortious.

Legally, the holding of the lower court is fully in accord with California authorities which hold that there is no cause of action based upon an alleged interference with prospective business advantage when the conduct complained of falls within a privilege.

The general principles governing actions for inducing breach of prospective business advantage are set out in the case of *Lawless v. Brotherhood of Painters* (1956), 143 Cal. App. 2d 474, 477-478 as follows:

> "It is true that an action will lie for unjustifiably inducing a breach of contract by a party thereto. [Citations omitted.] However, the inducement must be wrongful and unprivileged. One who is in a confidential relationship with a party to a contract is privileged to induce the breach of that contract." (143 Cal. App. 2d at 477 and 478.)

Another base of privilege was:

> "If two parties have separate contracts with a third, each may resort to any legitimate means at his disposal to secure performance of his contract even though the necessary result will be to cause a breach of the other contract." (143 Cal. App. 2d at 478.)

Under the first basis of privilege set out in the *Lawless* case, the activities of the League were privileged

because of the confidential relationship betwen the League and its own units, and especially the relationship between the League and the units when the units are conducting bridge tournaments where the League's master points are to be awarded.

Furthermore, by analogy to the second ground of privilege set out in the *Lawless* case, the activities of the League are privileged because the League was simply requiring the units to adhere to the scoring policies set out by the League when the tournament is to award the League's master points.

Other authorities holding to the same effect are:

Show Management v. Hearst Publishing Co. (1961), 196 Cal. App. 2d 606, 618-619; 16 Cal. Rptr. 731;

Wise v. Southern Pacific Co. (1963), 223 Cal. App. 2d 50, 72-73; 35 Cal. Rptr. 652;

Sullivan v. Warner Bros. Theatres, Inc. (1941), 42 Cal. App. 2d 660, 662; 109 P. 2d 760;

Restatement, Torts, § 769.

Finally, it is clear that the California courts do not require a trial on the merits to sustain the dismissal of an action when the defense is based upon a privilege. In both *Show Management v. Hearst Publishing Co., supra,* and *Wise v. Southern Pacific Co., supra,* the appellate courts affirmed the sustaining of demurrers to the complaint (or to certain causes of action of the complaints) when, as here, the applicable privilege is revealed by allegations in the complaint.

Since the activities of the League are reasonable and protected by privilege, plaintiff's Third Cause of Action fails to state a claim upon which relief can be granted. The judgment of the lower court in dismissing this cause of action should be affirmed.

Conclusion.

For the foregoing reasons the judgment of the District Court should be affirmed in all respects.

Dated: May 23, 1966.

Respectfully submitted,

JULIAN O. VON KALINOWSKI,
PAUL G. BOWER,
GIBSON, DUNN & CRUTCHER,
Attorneys for Appellees.

Certificate of Counsel.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals of the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those Rules.

PAUL G. BOWER

APPENDIX A.

Memorandum Opinion.

United States District Court, Southern District of California, Central Division.

Bridge Corporation of America, a corporation, Plaintiffs, vs. The American Contract Bridge League, Inc., etc., et al., Defendants. No. 64-897-JWC.

Filed: December 21, 1964.

This matter comes before the court upon defendants' motion to dismiss all seven causes of action set forth in plaintiff's first amended complaint.

The defendant, The American Contract Bridge League, Inc., hereinafter called the League, the principal defendant herein, is a non-profit corporation organized under the membership corporation laws of the State of New York for the purpose of promoting the playing of bridge throughout the United States and Canada. The other defendants are officers and directors of the League and are themselves engaged in carrying out its purposes. The League is the corporate combination of several hundred membership associations, or corporations, which plaintiff calls units, which are chartered by the League and are thereby given the exclusive right to conduct duplicate bridge tournaments in their particular areas. As a part of the scheme, the League operates a Master Point plan under which all players are scored, rated and their scores recorded. It also furnishes supplies and personnel to assist the units in conducting their tournaments.

The plaintiff has been incorporated for the express purpose of supplying personnel and equipment for the direction and scoring of duplicate bridge tournaments. In doing so, it uses a digital computer which it has designed and built and which it alleges performs the func-

tion of scoring much faster, more accurately, and less costly than the defendants' human score computers.

Plaintiff has demonstrated his computer, and some units have contracted for its use. However, the League has refused to allow any of its units to use plaintiff's computers and has compelled units which have already agreed to use it to breach their contracts with plaintiff, under threat that no Master Plan Points so computed will be recognized and recorded. It is this conduct which plaintiff contends is monopolistic and an unlawful restraint of trade within the proscription of the Sherman Act.

In moving to dismiss counts one and two of the amended complaint, the defendants contend that they are engaged in the promotion of the game of contract bridge and that bridge is not "trade or commerce" within the meaning of the Sherman Act. At the time of the hearing plaintiff made it clear that it was making no contention that the promotion of bridge tournaments, as such, is or is not "trade or commerce" within the meaning of the Sherman Act. But it does contend that the *furnishing of personnel* for the purpose of scoring tournaments is "trade or commerce".

This appears to be a case of first impression as no authorities have been cited and none have been found which bear directly upon the issue.

Any league or association must have rules and regulations in order to survive, and since its membership is entirely voluntary, it can impose almost any condition upon its membership which it wishes so long as these conditions are not unlawful and have some reasonable relation to the purpose of the league. *Molinas v. National Basketball Ass'n.*, 190 F. Supp. 241 (S.D.N.Y. 1961). Since the very basis of the League's appeal to its mem-

bership is the Master Point plan, it seems only reasonable and logical that the League should seek to control the mechanics of scoring. And since it is the one which awards the Master Points, it can give or withhold these Master Points upon whatever conditions it may determine. If some monopolistic effects follow or any restraint of trade results, this is still not the kind of "trade or commerce" that Congress had in mind in enacting the Sherman Act.

As to counts three through seven, the defendants have moved to dismiss upon the grounds "that it appears on the face of the first amended complaint that the jurisdiction of this court for these causes of action depends upon diversity of citizenship and that such diversity is not shown by the complaint because it is either alleged in the complaint that plaintiff Bridge Corporation of America and defendant American Contract Bridge League, Inc. are citizens of the same state or the complaint does not allege the citizenship of the defendant American Contract Bridge League, Inc. in that the complaint fails to allege in which state said League has its principal place of business." This contention is valid. *Stenhouse v. Jacobson,* 193 F. Supp. 694 (N.D. Calif. 1961); *Brandt v. Bay City Super Market,* 182 F. Supp. 937 (N.D. Calif. 1960).

In view of the foregoing discussion, it is unnecessary to discuss the other contentions urged by the defendants.

Plaintiff's first amended complaint will, therefore, be dismissed as to all counts and plaintiff shall have thirty days within which to amend.

Dated this 21st day of December, 1964.

/s/ Jesse W. Curtis
United States District Judge

APPENDIX B.

Memorandum Opinion.

United States District Court, Southern District of California, Central Division.

Bridge Corporation of America, Plaintiff, v. The American Contract Bridge League, Inc., etc., et al., Defendants. No. 64-897-JWC.

Filed December 16, 1965.

This is the second time this matter has come to the attention of this court on a motion to dismiss plaintiff's complaint. The second amended complaint, now under consideration, consists of three alleged causes of action. The first of which is based on certain alleged violations of Sections 1 and 2 of the Sherman Act. The second is based on diversity of citizenship and alleges certain violations of the Cartwright Act. The third is also based on diversity of citizenship and alleges an interference with the prospective business advantage of the plaintiff.

In ruling on defendant's earlier motion to dismiss plaintiff's first amended complaint, the court considered in its memorandum opinion, filed December 21, 1964, and discussed most of the contentions now being urged. The court has already ruled that the conduct complained of does not constitute the kind of "trade or commerce" contemplated by the Sherman Act, and although not previously discussed, for the same reasons it would appear that it does not constitute "trade or commerce" as contemplated by the Cartwright Act. With reference to the plaintiff's third cause of action, the court has already ruled that the restriction as to the recording of

master points is reasonable and logical under the circumstances, and is permissible.

Upon reconsidering the matters raised by the defendant's motion to dismiss, the court holds the same views as expressed in its memorandum opinion, and for these reasons the defendant's motion to dismiss plaintiff's second complaint is granted as to all counts.

Dated this 16th day of December, 1965.

Jesse W. Curtis /s/

APPENDIX C.
Judgment.

United States District Court, Southern District of California, Central Division.

Bridge Corporation of America, a corporation, Plaintiff, v. The American Contract Bridge League, Inc., etc., et al. Defendants. No. 64-897-JWC.

Filed January 3, 1966.

The motion of Defendants to dismiss all three alleged causes of action of Plaintiff's Second Amended Complaint having come on for hearing on November 29, 1965 before the Honorable Jesse W. Curtis, both parties appearing through their counsel, and the Court by Memorandum Opinion dated December 16, 1965 having granted said Motion, it is hereby

ORDERED, ADJUDGED AND DECREED that the First Cause of Action of Plaintiff's Second Amended Complaint be dismissed for lack of jurisdiction over the subject matter, that the Second and Third Causes of Action of Plaintiff's Second Amended Complaint be dismissed for failure to state a claim upon which relief can be granted, and that Defendants recover from Plaintiff their costs.

DATED: January 3rd, 1966.

Jesse W. Curtis
United States District Judge

APPENDIX D.

§16720. "Trust": Purposes. A trust is a combination of capital, skill or acts by two or more persons for any of the following purposes:

(a) To create or carry out restrictions in trade or commerce.

(b) To limit or reduce the production, or increase the price of merchandise or of any commodity.

(c) To prevent competition in manufacturing, making, transportation, sale or purchase of merchandise, produce or any commodity.

(d) To fix at any standard or figure, whereby its price to the public or consumer shall be in any manner controlled or established, any article or commodity of merchandise, produce or commerce intended for sale, barter, use or consumption in this State.

(e) To make or enter into or execute or carry out any contracts, obligations or agreements of any kind or description, by which they do all or any or any combination of any of the following:

(1) Bind themselves not to sell, dispose of or transport any article or any commodity or any article, use, merchandise, commerce or consumption below a common standard figure, or fixed value.

(2) Agree in any manner to keep the price of such article, commodity or transportation at a fixed or graduated figure.

(3) Establish or settle the price of any article, commodity or transportation between them or themselves and others, so as directly or indirectly to preclude a free and unrestricted competition among themselves, or any purchasers or consumers in the sale or transportation of any such article or commodity.

(4) Agree to pool, combine or directly or indirectly unite any interests that they may have connected with the sale or transportation of any such article or commodity, that its price might in any manner be affected.